

The taxpayer has appealed this decision to the Court of Appeals.

CUNA Mutual Insurance Society vs. Wisconsin Department of Revenue (Circuit Court of Dane County, October 28, 1982). The issue in this case is whether the publication, *Dimensions*, distributed by the taxpayer to credit unions qualifies for the exemption in s. 77.54 (25), Wis. Stats., as "printed material which is designed to advertise and promote the sale of merchandise or to advertise the services of individual business firms. . .". The Wisconsin Tax Appeals Commission held that *Dimensions* did not qualify for this exemption. (See Wisconsin Tax Bulletin #26 for a summary of the Commission's decision.) The Circuit Court reversed the Tax Appeals Commission's decision. The Circuit Court found this publication is designed for the purpose of advertising the taxpayer and credit unions and it does qualify for the exemption in s. 77.54 (25), Wis. Stats.

The department has appealed this decision to the Court of Appeals.

Wisconsin Department of Revenue vs. Gene E. Greiling (Court of Appeals District IV, September 10, 1982). Greiling operated a wholesale bedding and potted plant business. He purchased pre-cut, pre-drilled and shaped metal tubing and polyethylene film from out-of-state retailers. The materials were used to construct a protective plant enclosure to facilitate early season plant sales. He added watering, shading and ventilating systems to control the environment within the enclosure. The issue in this case is whether the enclosures are exempted from use tax by s. 77.54 (3), Wis. Stats., because they are parts of a "machine".

Section 77.54 (3), Wis. Stats., exempts the following items from the use tax: "The gross receipts from the sales of and the storage, use or other consumption of tractors and *machines*, including accessories, attachments, fuel and *parts therefor*, used directly in farming, including dairy farming, agriculture, horticulture or floriculture. . .". (Emphasis supplied.)

The department issued a use tax assessment against Greiling for the purchase of these materials. The Circuit Court reversed the Tax Appeals Commission and held that the

enclosures were not a part of an exempt "machine" (see WTB #28).

The Court concluded that Greiling did not clearly establish that the farm machine exemption applies to his purchases since the statute can be reasonably construed to exclude these purchases from its coverage. Accordingly, a use tax must be paid on the materials purchased by Greiling to construct plant enclosures.

The taxpayer has appealed this decision to the Supreme Court.

Wisconsin Department of Revenue vs. Milwaukee Brewers Baseball Club (Court of Appeals, District IV, June 24, 1982). This case involves two issues: (1) Does the sales or use tax apply to the purchase by the Milwaukee Brewers Baseball Club of the tickets which when purchased by the customer give him or her the right to enter the stadium to view the game? and (2) Does the sales or use tax apply to the baseball club's purchase of promotional items distributed to a class of ticket holders on special occasions? The Circuit Court held that the taxpayer's purchases of tickets were not taxable, but purchases of promotional items were taxable (see WTB #26).

Taxpayer is engaged in the ownership and operation of a professional baseball franchise known as the Milwaukee Brewers, with the principal office located at Milwaukee County Stadium. In connection with its home games, taxpayer sells admission tickets on a season ticket and individual game basis. The department assessed use tax on amounts paid by the taxpayer to an out-of-state vendor for the purchase of admission tickets and amounts paid by the taxpayer to out-of-state vendors for purchases of promotional items.

The Court of Appeals held that the club's purchase and use of the tickets is subject to the use tax. Under s. 77.51 (24), Wis. Stats., the tickets are transferred for use or consumption but not for resale and the cost of the ticket is not included in the admission price charged customers.

The Court of Appeals also held that the promotional items are not part of a "sale of admissions". The club's purchases of promotional items are taxable under s. 77.51 (4) (k), Wis. Stats., which provides that a sale to a purchaser who distributes an article "gratuitously apart from the sale

of other tangible personal property or service" is taxable as a sale.

The taxpayer has appealed this decision to the Supreme Court.

Wisconsin Department of Revenue vs. Mining Equipment Mfg. Corp. (Circuit Court of Dane County, October 26, 1982). In Wisconsin Tax Bulletin #29 it was indicated that the department had appealed the Tax Appeals Commission's decision of February 26, 1982. The Commission held that the taxpayer's good faith acceptance of exemption certificates for its sale of its equipment to 1) construction contractors claiming such equipment would be left in the ground and become a structural part of the real estate and 2) construction contractors alleging that such equipment was purchased for waste treatment or pollution abatement plant and equipment purposes, relieved it from payment of sales tax.

On October 26, 1982 the Circuit Court issued a default judgement against the taxpayer corporation which was limited to a holding that the department was not deemed to have acquiesced in the construction of s. 77.52 (14), Wis. Stats., given by the Commission in its February 26, 1982 decision.

Wisconsin Department of Revenue vs. J. C. Penney Company, Inc. (Court of Appeals District IV, July 27, 1982). The issues in this case involve (1) the department's assessment of use tax on J. C. Penney catalogs printed in Indiana and mailed to Wisconsin residents and (2) the department's assessment of use tax on newspaper supplements purchased by the taxpayer from an out-of-state printer and distributed with Wisconsin newspapers. The Circuit Court held that both the catalogs and the newspaper supplements were exempt from the use tax (see WTB #25).

The statutory definition of use includes two elements: (1) the taxpayer must own, possess, or enjoy the property in Wisconsin; and (2) the taxpayer must exercise some right or power over the tangible personal property in Wisconsin. The Court of Appeals held that J. C. Penney did not possess the catalogs in Wisconsin and therefore that the second element of the "use" test was not met. Because the catalogs moved by mail or common car-

rier from Minnesota to Wisconsin, they remained the property of the printer until they were delivered. After delivery, the recipients assumed ownership of the catalogs, and were free to read, store, or destroy them.

The department contended that since J. C. Penney maintains a copyright interest in its catalogs, J. C. Penney has a right or power over the catalogs. The Court of Appeals held that the taxpayer exercises a right only over the intangible property protected by the copyright, which is distinct from the tangible personal property on which the use tax is levied.

The Court further held that the taxpayer did not store or otherwise consume the catalogs in Wisconsin. The catalogs were in the custody of the printer through its agents while the catalogs were in transit. Ownership passed to the recipients upon delivery to them. J. C. Penney's actions in arranging for the transfer of the catalogs from the printer to the recipients did not constitute "keeping or retention" of the catalogs in Wisconsin. J. C. Penney did not exercise a consumptive right or power over the catalogs in Wisconsin.

The second issue involves the taxpayer's purchase of advertising supplements known as "preprints" from a printer in Minnesota. The Court of Appeals held that the preprints are subject to the use tax. The preprints contain only advertising for J. C. Penney products. Standing alone, they do not fit the definition of "newspaper". The second distinction between a preprint and a newspaper concerns the contribution the section makes to the character of the paper, and the frequency with which the section appears. Because there may be fewer preprints printed than there are newspapers to carry them, some buyers of a day's newspaper may not receive a preprint. If a newspaper edition failed to carry a particular preprint, few readers would notice.

Neither the department nor the taxpayer have appealed this decision.

Rice Insulation, Inc. vs. Wisconsin Department of Revenue (Circuit Court of Dane County, Branch 5, September 21, 1982). The issue in this case is whether Rice Insulation is liable for use tax under s. 77.53 (1), Wis. Stats., on the sales

price of materials purchased by it without paying a tax, which materials it installed in an exempt hospital. The charitable hospital engaged in building activities on its premises. It contracted with a general contractor to do the work. As permitted in its contract with the general contractor, the hospital purchased insulation material from the taxpayer and the general contractor engaged the taxpayer as a subcontractor to install the insulation. The issue for determination by the court was whether Rice Insulation had "sound reason to believe he will sell to customers for whom he will not perform real property construction activities involving the use of such property." s. 77.51 (18), Wis. Stats. The Tax Appeals Commission concluded that the taxpayer "... had sound reason to believe it would sell the materials to customers for whom it would perform real property construction activities involving the use of the materials."

The general contract was dated December 15, 1971 and the original purchase order for the insulation material was dated November 22, 1972. The taxpayer's sub-contract with the general contractor is also dated November 22, 1972, and the subcontract is for "materials and equipment to be furnished and work to be done by the Subcontractor". The fact that the purchase order for the material and the subcontract have the same date leads one to the conclusion that the taxpayer knew that its sale of the material and the labor were both related to the work at the hospital. And this is made clear by the fact that the bills for material indicated it was delivered as the work progressed.

Rice insulation performed the work that the general contractor was contractually obligated to do; it did the work for the hospital under its contractual obligation to the general contractor. The installation of the materials was for the hospital, regardless of the contractual relations of the several parties involved.

The Circuit Court affirmed the Commission which found the taxpayer was a subcontractor who purchased and was the consumer of tangible personal property used by it in real property construction activities and use tax applies to the sale of the materials used by it. It also found under s. 77.51 (18), Wis. Stats., the con-

tractor did not issue proper resale certificates because it had sound reason to believe it would sell the materials to customers for whom it would perform real property construction activities involving the use of the materials.

The taxpayer has appealed this decision to the Court of Appeals.

Eugene F. Rock and Eugene F. Rock d/b/a Rock's Round Barn vs. Wisconsin Department of Revenue (Circuit Court of Sauk County, August 27, 1982). This is an appeal of the department's assessment of additional income tax of \$48,805.13 for 1966 through 1972. (See WTB #28 for summary of Wisconsin Tax Appeals Commission's decision.) During the seven year audit period, taxpayer reported \$13,572 as taxable income. The department, through the use of income reconstruction, determined that the taxpayer had an actual income of \$253,744. The department assessed additional income tax under s. 71.11 (21) (c), Wis. Stats., and assessed the civil fraud penalty under ss. 71.11 (6) (a) and (b), Wis. Stats. The taxpayer pled no contest to a criminal charge which was related to this assessment. The taxpayer set forth several reasons why the department's assessment of additional taxes is invalid. Those reasons are as follows:

1. Notice of the assessment was defective;
2. The hearing before the Commission denied the taxpayer due process of law;
3. The department has not met its burden on the issue of taxpayer's fraudulent intent;
4. The field audit is inadequate; and
5. The taxpayer has been placed in double jeopardy.

The Circuit Court held in favor of the department.

The taxpayer has not appealed this decision.

HOMESTEAD CREDIT

Mary M. Flanders vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, July 15, 1982). On April 12, 1979 Mary Flanders and her then-husband were granted a divorce. Under the divorce judgment, taxpayer was granted custody and control of the couple's minor child. Under the

judgment, Mr. Flanders was ordered to pay to Mary \$400.00 per month "toward the support of the minor child of the parties" until the child is 18 years old or is sooner emancipated. These payments were to be made to the Portage County Clerk of Courts who would pay the amounts to the taxpayer. During 1979 Mary Flanders received \$4,800.00 in child support payments from her former husband, through the Portage County Clerk of

Courts. The checks were payable to Mary Flanders individually.

The issue in this case is whether or not child support payments received by Mary Flanders from her former husband under a divorce judgment, to be used to support the couple's minor child in taxpayer's custody, should be included in "household income" for purposes of calculating taxpayer's 1979 Wisconsin Home-

stead Credit. The Commission held that the \$4,800.00 Mary Flanders received in 1979 from her former husband under the terms of a divorce judgment as child support is properly includable in "household income" for purposes of calculating taxpayer's 1979 Wisconsin Homestead Credit Claim.

The taxpayer has not appealed this decision.

TAX RELEASES

("Tax Releases" are designed to provide answers to the specific tax questions covered, based on the facts indicated. However, the answer may not apply to all questions of a similar nature. In situations where the facts vary from those given herein, it is recommended that advice be sought from the Department. Unless otherwise indicated, Tax Releases apply for all periods open to adjustment. All references to section numbers are to the Wisconsin Statutes unless otherwise noted.)

INDIVIDUAL INCOME TAXES

1. Subchapter S Corporation's Capital Gain Income

For federal purposes, a Subchapter S corporation's net capital gain is an exception to the federal no-conduit rule which provides that the characteristics of individual items of income and expense do not pass through to shareholders. Since net capital gain retains its character as capital gain when passed through to shareholders, such income is given long-term capital gain treatment on the shareholder's individual federal returns.

For Wisconsin purposes, *all* income from a Subchapter S corporation is treated as ordinary income on an individual's Wisconsin income tax return. Wisconsin corporation franchise/income tax law does not distinguish income or loss from the sale of business capital assets from ordinary business income.

Because of this difference in the manner in which Wisconsin and federal law treat capital gains received from a Subchapter S corporation, a shareholder who has reported a long-term capital gain on line 15 of federal Schedule D (the line for reporting Subchapter S gains) must make an adjustment (an add modification on line 30, Form 1) on his or her Wisconsin income tax return to account for the difference in the Wisconsin and federal treatment of gains received from a Subchapter S corporation. To figure the amount of the add modification, a shareholder must determine (on a separate worksheet) the amount which would be reportable on line 28 of Wisconsin Form 1 if the Subchapter S gain is treated as ordinary income rather than capital gain income. This amount should then be compared to the amount which has been reported on line 28 and the difference between these amounts, if any, is the amount of the addition modification which must be made on line 30, Form 1.

Example: A person receives a \$10,000 long-term capital gain from a Subchapter S corporation. Assume no other income is received.

	Gain Treated as Capital Gain	Gain Treated as Ordinary Income	Difference
Federal AGI	\$4,000	\$10,000	\$6,000
Line 27, Wis. Form 1	<u>4,000</u>	<u>-0-</u>	<u>(4,000)</u>
Line 28, Wis. Form 1	<u>\$8,000</u>	<u>\$10,000</u>	<u>\$2,000</u>

The addition to federal income which would be required to be made on line 30, Form 1 is \$2,000.

2. Taxing Unemployment Compensation - Wisconsin Different Than Federal

Beginning with 1982, the base amounts for determining taxable unemployment compensation (UC) for federal purposes has been lowered to \$12,000 for single persons and \$18,000 for married persons filing a joint federal income tax return. However, for Wisconsin taxable UC must be determined under the base amounts in the Internal Revenue Code in effect as of December 31, 1981, which are \$20,000 for single taxpayers and \$25,000 for married persons. This difference between the federal and Wisconsin base amounts means that some taxpayers may have taxable UC for federal but not for Wisconsin. The instructions for the 1982 Form 1 and Form 1A explain how to compute taxable UC for Wisconsin.

Full Year Residents of Wisconsin: Full year residents must determine taxable UC using the \$20,000 and \$25,000 base amounts mentioned above. A schedule for computing taxable UC for Wisconsin is found on page 3 of the 1982 Form 1 and Form 1A instructions.

Part-Year Residents: UC received while a person is a resident of Wisconsin may be taxable for Wisconsin purposes, regardless of whether the payments relate to personal services performed in Wisconsin or another state. Part-year residents must determine taxable UC as follows:

1. All UC Received While a Resident of Another State

If all UC is received while a person is a resident of another state, none of the UC is taxable for Wisconsin purposes, regardless of whether the payments relate to services performed in Wisconsin or another state.